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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

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JOHNNIE DUNNING,	**§**	
APPELLANT	**§**	
	§	
v.	**§**	**NO. PD-0445-18**
	§	
THE STATE OF TEXAS,	**§**	
APPELLEE	**§**	

§ § §

STATE'S BRIEF ON THE MERITS OF STATE'S PETITION FOR DISCRETIONARY REVIEW

§ § §

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DNA Proceedings Judges:

Hon. Mollee Westfall, Presiding Judge, 371st Judicial District Court of Tarrant County, Texas

Hon. Charles P. Reynolds, Tarrant County Writ Magistrate

Parties to the Judgment:

Appellant, Johnnie Dunning, and the State of Texas

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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JOHNNIE DUNNING, *APPELLANT*	§ § §	
V.	§	NO. PD-0445-18
THE STATE OF TEXAS, *APPELLEE*	§ § §	

STATE'S BRIEF ON THE MERITS OF
STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This brief is filed on behalf of the State of Texas by Sharen Wilson, Criminal District Attorney of Tarrant County. The State is appealing the Second Court of Appeals' decision vacating the trial court's finding that the results of the appellant's post-conviction forensic DNA testing were not favorable and holding that the new DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of his trial.

STATEMENT OF THE CASE

This case addresses a trial court's determination under Texas Code of Criminal Procedure article 64.04 that post-conviction DNA testing results do

not establish a reasonable probability of a defendant's non-conviction even though the results exclude him as a contributor to the biological material tested.

STATEMENT OF PROCEDURAL HISTORY

The appellant pled guilty to aggravated sexual assault of a child younger than 14 years of age, and was sentenced to twenty-five years' confinement on July 14, 1999. (C.R. I:77-78). The Court of Appeals for the Second District of Texas affirmed his conviction on July 23, 2002. (C.R. I:94-100).

The trial court ordered post-conviction forensic DNA testing done on the victim's white swim shorts and on the contents of his sexual assault kit by the Texas Department of Public Safety (DPS), and by the Serological Research Institute (SERI). (C.R. I:133-34; Supp. C.R. I:7-8). Each laboratory issued reports from their DNA testing. (C.R. I:141-42, 158-64; DNA Hearing R.R. III:Defense Exhibit #1). After reviewing these reports, conducting a live hearing and considering other evidence, the trial court concluded that the DNA testing results did not cast affirmative doubt on the appellant's guilt and entered a "not favorable" finding. (C.R. I:370).

On March 1, 2018, the court of appeals held that the appellant had established a reasonable probability that he would not have been convicted had

his post-conviction DNA results been available at the time of trial, and ordered the trial court to vacate its "not favorable" finding and enter a finding that the appellant would not have been convicted had the post-conviction DNA results been available at the time of trial. See ***Dunning v. State***, 544 S.W.3d 912 (Tex. App. – Fort Worth 2018, pet. granted).

On June 21, 2018, this Court granted the State's petition for discretionary review on three grounds to determine whether the Court of Appeals properly concluded that the new DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of his trial.[1]

ISSUES PRESENTED

1. Whether the court of appeals properly determined that the post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of trial?

2. Whether the court of appeals gave proper deference to the trial court's determination of historical facts and application-of-law-to-fact issues that turn on credibility or demeanor?

3. Whether the court of appeals considered all the evidence before the trial

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1 The State set out five questions for review in its petition of which the Court granted review on questions 3, 4 and 5. See Order Granting Petition for Discretionary Review.

court in making its article 64.04 finding before determining that post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of trial?

STATEMENT OF FACTS

DPS issued a report on its DNA testing of the victim's white swim shorts and the contents of his sexual assault kit stating that:

- No interpretable DNA profile was obtained from the swabbing of the back waistband of the victim's white shorts.
- No interpretable DNA profile was obtained from the swabbing of the inside front crotch of the victim's white shorts.
- No interpretable DNA profile was obtained from the victim's perianal swab.
- No DNA foreign to the victim was obtained from his anal swabs.

(C.R. I:141-42). SERI issued a report stating that:

- The anal swab extract contained a single source male DNA profile matching the victim at all tested loci.
- The perianal swab extract contained a single weak male DNA profile from which the victim is included as a possible source. The defendant is excluded as a possible contributor to that profile.
- A single weak male DNA profile was obtained from a swab of the victim's white shorts that includes the victim as a possible source with the chance that another random person unrelated to him could be similarly included is approximately one in 330,000. The defendant is excluded as a possible contributor to that profile.
- A mixture of at least two individuals was obtained from the victim's shorts' crotch swab and crotch. The victim is included as the major contributor to both mixtures and the chance that another random person unrelated to him could be similarly included is approximately one in one billion. The defendant is excluded as a

possible contributor to both mixtures.

- A mixture of at least two individuals was obtained from the shorts' waistband swab with both the victim and the defendant excluded as possible contributors to its major portion. There is insufficient information in its minor component for making any conclusions.
- The shorts waistband extract contained a weak mixture of at least two individuals, including at least one male, but there is insufficient information for any further conclusions to be made.

(C.R. I:158-64; DNA Hearing R.R. III:Defense Exhibit #1).[2] Dr. Bruce Budowle - Director of the University of North Texas Center for Human Identification[3] - disputed SERI's exclusion of the victim as a potential contributor to the major component of the mixture DNA profile obtained from his shorts' waistband swab. (C.R. I:178-79; DNA Hearing R.R. III:Defense Exhibit #8).

At the live hearing, SERI analysist Amy Lee and Dr. Budowle agreed that the victim is the source for the DNA profiles obtained from his anal and perianal swabs[4] and that he is the primary source for most of the identifiable DNA

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2 Neither lab found the presence of blood or semen, which was consistent with the pre-trial finding by the Fort Worth Police Crime Laboratory. (C.R. I:141-42, 158-64; DNA Hearing R.R. III:Defense Exhibit #1 & 9).

3 Dr. Budowle is currently a member of the Texas Forensic Science Commission (FSC), and previously assisted them in addressing problems with DNA mixture interpretation. (DNA Hearing R.R. II:72). He also worked twenty-six years for the Federal Bureau of Investigation where he helped develop the DNA genetic marker system of bodily fluids and stains for forensic investigation purposes. (DNA Hearing R.R. II:71, III:Defendant's Exhibit #8).

4 The appellant was excluded as the source of these intimate sample DNA profiles since, as expected, they belonged to the victim. (DNA Hearing R.R. II:77-78).

profiles obtained from his white shorts. (DNA Hearing R.R. II:*passim*, III:Defense Exhibits #1 & #8). They also agreed that the appellant's DNA profile did not match any of the samples - either due to exclusion or insufficient information. (DNA Hearing R.R. II:*passim*, III:Defense Exhibits #1 & #8). Dr. Budowle and Ms. Lee disagreed on whether the victim was excluded as a potential contributor to the shorts' waistband swab DNA profile, and whether minor DNA profiles on his swim shorts established the presence of an alternate perpetrator. (DNA Hearing R.R. II:*passim*).

The trial court found that the DNA testing results, although excluding the appellant, did not cast affirmative doubt on his guilt and entered a "not favorable" finding. (C.R. I:370).[5] In reaching this conclusion, it can be presumed the trial court agreed that the victim could not be excluded as a potential contributor to the DNA profile obtained from the waistband swab, and that the presence of unattributed minor DNA alleles did not establish the presence of an alternate perpetrator. See ***Williams v. State***, 513 S.W.3d 619, 630 (Tex. App. - Fort Worth 2016, pet. refused) (when a record is silent on the reasons for the trial court's ruling or there are no explicit fact findings that have

5 This Court has defined a "favorable" DNA test result as one casting affirmative doubt on the validity of an inmate's conviction. See ***Ex parte Gutierrez***, 337 S.W.3d 883, 892 (Tex. Crim. App. 2011).

been requested, an appellate court may imply the necessary fact findings supporting that ruling if the evidence, viewed in its most favorable light, supports those findings). Moreover – as indicated by the exchanges during the motion for reconsideration hearing – the trial court made credibility assessments regarding the value of the scientific evidence; specifically, in determining the relevance of the unattributed alleles recovered from the swim shorts' crotch in establishing the presence of an alternate perpetrator. (DNA Hearing Supp. R.R. II:38-39, 44-45).

SUMMARY OF THE ARGUMENT

The trial court properly determined that results from the appellant's post-conviction forensic DNA testing do not establish a reasonable probability that he would not have been convicted had they been available at trial because they do not establish the presence of an alternate perpetrator and they do not cast affirmative doubt on validity of his guilty plea and conviction when considered against the balance of the other evidence. The court of appeals' holding that the testing results established a reasonable probability of non-conviction did not give proper deference to the trial court's credibility determinations regarding the scientific experts, ignored inculpatory evidence

considered by the trial court to reach its determination, and engaged in prohibited alternate perpetrator speculation.

ARGUMENT

A. Standard of Review

When reviewing a trial court's ruling on a Chapter 64 motion, the appellate court employs a bifurcated standard of review:

1. The trial court is afforded almost total deference in the determination of historical fact issues and the application of law to those fact issues when they turn on credibility and demeanor.

2. The appellate court reviews *de novo* the ultimate question of whether the trial court was required to grant a Chapter 64 forensic DNA testing request.

Reed v. State, 541 S.W.3d 759, 768-69 (Tex. Crim. App. 2017); ***Ex parte Gutierrez***, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011); ***Rivera v. State,*** 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). While there may be subsidiary fact issues which the appellate court reviews deferentially, a trial court's ultimate article 64.04 finding whether DNA testing results are favorable or unfavorable is a legal determination that calls for *de novo* appellate review. ***LaRue v. State***, 518 S.W.3d 439, 446 (Tex. Crim. App. 2017); ***Whitfield v. State***, 430 S.W.3d 430 S.W.3d 405, 424(Tex. Crim. App. 2014) (Alcala J., concurring).

B. Standard for Finding of Reasonable Probability of Non-Conviction

A defendant must show that it is more likely than not that he would not have been convicted had the fact-finder been able to weigh evidence that he did not deposit biological material against the balance of the other evidence in order to establish that exculpatory DNA results create a reasonable probability that he would not have been convicted. ***Reed v. State***, 541 S.W.3d. at 774; ***Holberg v. State***, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014); **Tex. Code Crim. Proc. art. 64.04**.[6] This reasonable probability standard means there exists a 51% chance that a defendant would not have been convicted if his requested testing results exclude him. ***LaRue v. State***, 518 S.W.3d at 446; ***Smith v. State***, 165 S.W.3d 361, 364 (Tex. Crim. App. 2005).

The courts must determine whether these results cast affirmative doubt on the validity of a defendant's conviction. ***Flores v. State***, 491 S.W.3d 6, 9 (Tex. App. - Houston [14th Dist.] 2016, pet. refused); ***Glover v. State***, 445 S.W.3d 858, 862 (Tex. App. - Houston [1st Dist.] 2014, pet. refused). Casting minimal doubt does not establish a reasonable probability that a defendant would not have been convicted. ***Flores v. State***, 491 S.W.3d at 11. Likewise,

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6 "Exculpatory results" means results excluding the convicted person as the donor of the biological material. ***Reed v. State***, 541 S.W.3d at 774; ***Holberg v. State***, 425 S.W.3d at 287.

inconclusive evidence does not cast doubt on a conviction's validity. ***Cates v. State***, 326 S.W.3d 388, 390 (Tex. App. - El Paso 2010, pet. refused); ***Baggett v. State***, 110 S.W.3d 704, 706-07 (Tex. App. – Houston [14th Dist.] 2003, pet. stricken).

C. DNA Testing Results Do Not Establish a Reasonable Probability of Appellant's Non-Conviction

1. DNA test results do not cast affirmative doubt on validity of appellant's conviction because they have little scientific value and do not establish the presence of an alternate perpetrator.

The DNA test results issued by DPS and SERI do not establish a reasonable probability that the appellant would not have been convicted despite his DNA's absence from the tested items because the presence of low-level DNA alleles (below the stochastic threshold) at three markers on the crotch swab from the victim's swim shorts that cannot be attributed to him or the victim or does not establish the presence of an alternate perpetrator.[7]

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7 In vacating the trial court's overall finding, the court of appeals expressed little concern over the trial court's implied finding that the victim contributed the DNA found on the waistband swab. See ***Dunning v. State***, 544 S.W.3d at 919-22. In summary:

- Ms. Lee excluded the victim as a contributor even though the results at D8S1179 showed alleles of 11 and 13 - consistent with the victim's profile - because the 11 allele only registered at 147 relative fluorescence units (RFU) which was below SERI's stochastic threshold of 150 RFUs for inclusion. (DNA Hearing R.R. II:58-59, 64, III:Defense

SERI found DNA alleles at three markers – D3, D19 and vWA – on the crotch swab from the victim's swim shorts that cannot be attributed to either him or the appellant. (R.R. III:Defense Exhibit #1).[8] Whether this low-level DNA recovered establishes the presence of an alternate perpetrator was thoroughly litigated at the DNA hearing. (DNA Hearing R.R. II79-81, 97).

Dr. Budowle cautioned against deducing the presence of an alternate

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Exhibit #2).

- Dr. Budowle responded that proper interpretation methods require an analyst look at alleles both above and below the threshold in interpreting data, and an analyst cannot just say that an allele with a 151 RFU is real while ignoring an allele with a 149 RFU simply because the stochastic threshold is set at 150 RFUs. (DNA Hearing R.R. II:83).
- Dr. Budowle described Ms. Lee's method of "drawing a line" at the stochastic threshold and automatically ignoring any peaks just below that line as a "naïve" and irresponsible interpretation method for either exclusions or inclusions. (DNA Hearing R.R. II:81-82, 85).
- Dr. Budowle concluded that the victim could be excluded as a potential contributor to the DNA profile's major portion. (DNA Hearing R.R. III:Defense Exhibit #8).
- Ms. Lee acknowledged that the alleles in the victim's DNA profile are consistent with the waistband swab's DNA profile at thirteen locations - nine locations above stochastic threshold and four locations below stochastic threshold, and his DNA profile correlated with the waistband swab profile. (DNA Hearing R.R. II:60-64).

Given this testimony regarding how alleles near the stochastic threshold should be considered and how SERI actually considered them, the trial court's finding that the victim could not be excluded as a potential contributor was the more accurate and responsible mixture interpretation.

8 Curiously, the only DNA allele on the crotch extract that cannot be attributed to the victim – the [13] at the D19 marker – does not differ from the appellant's known 12,13 at that same marker – raising questions how Ms. Lee even excluded him . (DNA Hearing R.R. III:Defense Exhibit #1).

perpetrator from these alleles, or even placing too much importance on them because:

- Low or trace level DNA on material can come from a variety of sources;
- Clothing is particularly sensitive to innocent DNA transfer;
- Must have a good amount of DNA to distinguish what is background DNA;
- SERI uses 29 cycles which heightens the visibility of low-level background DNA; and
- SERI did not take substrate samples to generate sufficient evidence to ascertain what might be background DNA.

(DNA Hearing R.R. II:79-81, 97).[9] Dr. Budowle also raised concerns that these minor DNA alleles may have already been on the swim shorts before the victim wore them – a likely scenario given that they were not in pristine condition. (DNA Hearing R.R. II:87-89, III:Defense Exhibit #1).

This Court has expressed concerns about giving too much importance to minor or touch DNA:

> Testing technology has advanced to the degree that a small number of skin cells may yield a DNA profile. But as Reed's DNA experts explained the exchange principle, there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them. Just as a person may deposit his own epithelial cells, he may deposit another's if those cells were exchanged to him by

9 The trial court's implied finding that these minor DNA alleles were attributable to incidental contact with the victim's clothing rather than an alternate perpetrator is also more reasonable given that the two intimate samples – the anal swab and the perianal swab – produced single source profiles attributable to the victim. (DNA Hearing R.R. III:Defense Exhibit #1; Supp. R.R. II:25).

> touching an item another has touched. So the exchange principle may support an equally persuasive argument that the DNA profile discovered from an epithelial cell was not deposited by the same person associated with the particular DNA profile. And as with all DNA testing generally, touch DNA analysis cannot determine when an epithelial cell was deposited. So in addition to being unable to definitively show who left the epithelial cell, it is unable to show when it was deposited.

Reed v. State, 541 S.W.3d at 777. The trial court's finding and Dr. Budowle's concerns are consistent with this Court's concerns.

SERI's protocols and interpretation guidelines also dictate against making broad conclusions from minor DNA found on clothing without taking substrate controls. (DNA Hearing R.R. II:80, III:State's Exhibit #1). Ms. Lee did not mention undertaking any appropriate substrate controls for this minor DNA even though the swim shorts were not pristine or in a condition suggesting the lack of prior innocent contact by other people – a critical omission noted by Dr. Budowle. (DNA Hearing R.R. II:80, III:Defense Exhibit #1).

Put simply, these low-level DNA alleles should be accorded little scientific value in deciding whether the test results establish a reasonable probability of non-conviction. See ***Glover v. State***, 445 S.W.3d at 862 (evidence containing unidentified minor alleles does not cast doubt on conviction where State did not rely on DNA evidence as basis for conviction); ***Ewere v. State***, 2017 WL 5559585, at *3 (Tex. App. – Dallas November 16, 2017, no pet.) (not designated

for publication) (genetic markers unattributed to defendant or "unknown female" did not affirmatively link someone else to the sexual assault; gender-inconclusive DNA merely "muddied the water" and did not justify a favorable finding when the jury was already aware that no physical evidence connected defendant to the crime scene or the sexual assault).[10]

In sum, the trial court's determination that the low-level DNA alleles unattributed to the victim or the appellant had little scientific value and did not establish the presence of an alternate perpetrator giving rise to a reasonable probability of non-conviction was supported by Dr. Budowle's scientific testimony and by SERI's own interpretation guidelines, and, thus should be given deference.[11]

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10 Moreover, there is no evidence that these minor DNA alleles definitely came from a male since SERI's report used the term "individuals", and neither Ms. Lee nor Dr. Budowle testified that this mixture came from two males.

11 The appellant's central theme has been that the testing results must exonerate him because they exclude him as a contributor. This Court and various intermediate courts of appeals, however have long rejected the notion that the absence of a defendant's DNA on the items tested – i.e. exculpatory results - does not establish a reasonable probability of non-conviction even where their presence would indicate his guilt. See ***LaRue v. State***, 518 S.W.3d at 449 (exculpatory results do not necessarily exonerate a defendant); ***Rivera v. State***, 89 S.W.3d 55, 56, 59 (Tex. Crim. App. 2002) (reasonable probability of innocence not established based on the absence of DNA under the defendant's fingernails and negative results from the victim's sexual assault kit); ***Wright v. State***, 2004 WL 502906 (Tex. App. - Houston [14th Dist.] 2004) (no reasonable probability of innocence established where no DNA profile was obtained from the anal or oral smear slides, no male DNA profile was obtained

2. DNA test results do not cast affirmative doubt on validity of appellant's conviction when considered against the balance of the other evidence.

The reviewing court should consider all the evidence before the trial court in making its *de novo* review of whether a reasonable probability exists that a defendant would not have been convicted had the DNA results been available at trial. ***Asberry v. State***, 507 S.W.3d 227, 229 (Tex. Crim. App. 2016). Results excluding a defendant as the DNA's donor does not absolve him from showing that, more likely than not, he would not have been convicted had the fact-finder been able to weigh evidence that he did not deposit biological material against the balance of the other evidence. ***Reed v. State***, 541 S.W.3d. at 774; ***Holberg v. State***, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014). Review of the trial or plea proceedings is an essential component of a Chapter 64 determination because the trial court must compare the proof offered at trial with the proof currently available. ***Asberry v. State***, 507 S.W.3d at 228.

First, the appellant pled guilty to committing this aggravated sexual

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from the vaginal smear slides, and no DNA evidence was extracted from the remaining samples). Thus, the absence of the appellant's DNA from any testing results by SERI or DPS does not automatically equate to a reasonable probability of non-conviction.

assault. (C.R. I:77; Plea Hearing R.R. III:57).[12] He also entered a written judicial confession admitting to committing this aggravated sexual assault, and testified that he committed this assault by inserting his penis into the victim's anus. (C.R. I:75; Plea Hearing R.R. III:20-21, 57). The appellant's guilty plea and admissions should be given great value in balancing the proof offered at trial with the proof currently available because the appellant, on advice of counsel, chose to plead guilty and waive the appearance, confrontation and cross-examination of witnesses against him. (C.R. I:75; Plea Hearing R.R. III:17 & Exhibit #1). His choice relieved the State of its requirement to prove guilt by presenting witness testimony or other inculpatory evidence as it would have done in a trial – a choice leaving the trial court only the appellant's judicial confession, his admissions under oath that he committed this offense, and the State's files showing what it might have presented at a potential trial. (R.R. III:Defense Exhibit #9; Plea Hearing R.R. III:18, 20-21, 57).[13]

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12 The State recognizes that a guilty plea cannot be the sole basis for denying testing under article 64.03's identity at issue prong; however, there is nothing that prevents a trial court from considering an appellant's guilty plea and admissions in deciding whether DNA results are favorable under article 64.04. See **Tex. Code Crim. Proc. art. 64.03(b), 64.04**.

13 Contrast ***Reed v. State***, 541 S.W.3d at 774-77; ***Holberg v. State***, 425 S.W.3d at 283, 287-88 (the trial court and the reviewing court had benefit of a trial transcript to weigh incriminating evidence against new exculpatory testing results).

In deciding that the new results did not establish a reasonable probability of non-conviction, the trial court went beyond just the appellant's plea and admissions and examined the contents of the State's files (Defense Exhibit #9) which included inculpatory evidence that:

- The victim made his initial identification of the appellant to family friend James Oliver at the pool immediately after the sexual assault occurred and before he ever told his stepfather Lorne Clark; and
- The victim identified the appellant to his mother the following day at the apartment complex which is how the appellant actually came to police attention.

(DNA Hearing R.R. III:Defense Exhibit #9). Such diligence by the trial court is reflected in its inquiries into the identification process when it was reconsidering its 64.04 finding. (DNA Hearing Supp. R.R. II:21-23).[14] This proximate identification by the victim of the appellant as the perpetrator, along with the appellant's own in-court admissions, is sufficient evidence to establish guilt, and supports a finding that the new DNA testing results do not establish a reasonable probability of non-conviction. See ***Swearingen v. State***, 303 S.W.3d 728, 736 (Tex. Crim. App. 2010) (reasonable probability of non-conviction does not exist if there is sufficient evidence, other than the DNA

14 The trial court even questioned about the victim's forensic interview. (DNA Hearing Supp. R.R. II:24). While not part of this record, a recording of the victim's forensic interview was provided to the trial court before it declined to rule on the appellant's motion for reconsideration.

evidence in question, to establish guilt).[15]

Second, the appellant knew before entering his guilty plea that there was no usable inculpatory DNA evidence or third-party eyewitness testimony linking him to this offense - only the victim's identification. (Plea Hearing R.R. III:40-41, 46-48; DNA Hearing R.R. II:25-26, III:Defense Exhibit #9). As such, these new DNA testing results did not change the character of the evidence from when the appellant pled guilty to this sexual assault, and thus, do not cast affirmative doubt on the validity of his conviction. See ***Glover v. State***, 445 S.W.3d at 862 (evidence containing unidentified DNA does not cast doubt on conviction where State did not rely on DNA evidence as basis for conviction).

Finally, this evidentiary comparison does not authorize courts to speculate in alternate theories unsupported by any evidence in deciding whether DNA testing results create a reasonable probability of non-conviction. See ***State v. Swearingen***, 478 S.W.3d 716, 721-22 (Tex. Crim. App. 2015) (court may not assume hypotheticals or other speculations in determining reasonable

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15 It should be noted that the court of appeals' "record" description does not mention this inculpatory evidence contained in the police files even though they were admitted as an exhibit during the 64.04 hearing, considered by the trial court in making its reasonable probability of non-conviction determination, and referenced by the State in its appellate brief and during oral argument. See ***Dunning v. State***, 544 S.W.3d at 921-22. Such an omission raises the question of whether the court of appeals complied with *Asberry* and reviewed everything before the trial court.

probability of non-conviction), *cert. denied*, ___ U.S. ___, 137 S.Ct. 60, 196 L.Ed.2d 32 (2016). The court of appeals' "alternate Lorne Clark theory" falls within this prohibition because it was either outside or contrary to the evidence available to the trial court[16], and should be vacated.

In sum, the appellant had essentially the same information, including the lack of inculpatory DNA evidence, before him when he made his decision to plead guilty to this aggravated sexual assault; thus, these new DNA results do not cast doubt on the validity of that guilty plea or the appellant's admissions of guilt despite his DNA's absence from the tested items.

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16 The following evidence undercuts the court of appeals' alternate hypothesis:

- The appellant stipulated at the plea hearing that the victim had never made any allegation that Clark sexually abused him, and that no formal or informal allegations had ever been made that Clark sexually abused the victim. (Plea Hearing R.R. III:23).
- The victim consistently told numerous people that he was sexually assaulted by a black male when Clark is a white male. (Plea Hearing III:28-29, 42).
- The contemporaneous police records show that the victim actually made his initial identification to family friend James Oliver at the pool immediately after the sexual assault occurred and before he ever told Clark, which was confirmed by an investigating officer at the plea hearing. (DNA Hearing R.R. III:Defense Exhibit #9; Plea Hearing R.R. III29).

Additionally, the trial court specifically excluded speculation by the appellant's trial counsel that Clark "manipulated" the victim because it was not supported by any evidence. (R.R. II:15).

CONCLUSION

This Court should vacate the court of appeals' finding that the post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at trial because the appellate court did not give proper deference to the trial court's credibility determinations regarding the scientific experts, ignored inculpatory evidence considered by the trial court, and engaged in prohibited alternate perpetrator speculation.

This Court should instead uphold the trial court's determination that the testing results do not show a reasonable probability of non-conviction because they do not establish the presence of an alternate perpetrator or cast affirmative doubt on the validity of the appellant's guilty plea and conviction when considered against the balance of the other evidence.

PRAYER

The State prays that this Court reverse and vacate the decision of the Court of Appeals, and reinstate the finding by the trial court that the post-conviction DNA testing results herein do not establish a reasonable probability of the appellant's non-conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The State's brief on the merits of its petition for discretionary review has been electronically served on opposing counsel, Mr. William H. Ray, 515 Houston Street, Suite 611, Fort Worth, Texas 76102 (bill@billraylawyer.com), on this, the 17th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word count requirements of Tex. R. App. P. 9.4 because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains approximately 4248 words, excluding those parts specifically exempted, as computed by Microsoft Office Word 2013 - the computer program used to prepare the document.

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